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AN ADDED EXCEPTION TO THE TBT AGREEMENT AFTER *CLOVE*, *TUNA II*, AND *COOL*

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Abstract: In three 2012 cases, the World Trade Organization (WTO) found a United States regulation inconsistent with Article 2.1 but consistent with Article 2.2 of the Agreement on Technical Barriers to Trade (TBT Agreement). Article 2.1 contains the TBT Agreement's non-discrimination obligations and Article 2.2 requires regulations to not be more trade restrictive than necessary. Despite the fact that violating Article 2.1 does not necessarily implicate Article 2.2, international trade theorists questioned whether the Appellate Body purposely avoided finding any of the regulations more trade restrictive than necessary. This Note argues that the Appellate Body showed its preference for finding violations under Article 2.1, as opposed to Article 2.2, by making it difficult for complainants to succeed with an Article 2.2 claim. Because it was more comfortable finding violations under the guise of discrimination, however, the Appellate Body added a necessity test to Article 2.1. Although this reading of Article 2.1 limits the regulatory authority of WTO Members, it successfully tests necessity and thus gives the TBT Agreement force, while also showing deference to regulatory sovereignty by functioning like an exception provision.

INTRODUCTION

In three separate disputes in 2012, *United States—Measures Affecting the Production and Sale of Clove Cigarettes* (U.S.—Clove Cigarettes), *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products* (U.S.—Tuna II), and *United States—Certain Country of Origin Labeling* (U.S.—COOL), the World Trade Organization's Dispute Settlement Body (DSB) ruled that a United States regulation violated Article 2.1 of the Agreement on Technical Barriers to Trade (TBT Agreement).¹ Despite its purportedly well-intentioned regulatory ob-

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¹ Duane W. Layton, Paulette Vander Schueren, & Margaret-Rose Sales, *WTO Appellate Body Brings Coherence to Trade Rules on Technical Regulations*, MAYER BROWN (July 9, 2012), <http://m.mayerbrown.com/wto-appellate-body-brings-coherence-to-trade-rules-on-technical-regulations-07-09-2012/>.

jectives—preventing youth smoking, protecting dolphins, and providing consumers with national origin information for meat products—the United States now has to amend or repeal all three regulations in order to comply with these rulings.² If the United States fails to comply, then it will become vulnerable to retaliatory trade action, likely in the form of higher tariffs on U.S. goods from the complainants in these disputes, Indonesia, Mexico, and Canada.³

These three cases are of particular importance, not only for the effect they will have on U.S. efforts to regulate cigarettes, tuna fishing, and meat sales, but also because together they provide needed context for interpreting the TBT Agreement.⁴ Before these cases, TBT Agreement jurisprudence was lacking, which left its scope ambiguous.⁵ This new jurisprudence comes at an appropriate time because World Trade Organization (WTO) members are increasingly using technical barriers to trade (TBTs), including product, labeling, and packaging requirements.⁶ Therefore, more disputes will likely be brought under the TBT Agreement.⁷

As welcome as this new jurisprudence is, the WTO Appellate Body's (Appellate Body) analyses have raised additional questions about how the TBT Agreement should be interpreted.⁸ Particularly noteworthy is the fact that, in each of the three cases, the regulation in

² See Arbitration Under Article 21.3 (c) of the Understanding on Rules and Procedures Governing the Settlement of Disputes, *United States—Certain Country of Origin Labeling*, ¶ 123, WT/DS384/24, WT/DS386/23 (Dec. 4, 2012) [hereinafter *U.S.—COOL Compliance Report*]; Agreement Under Article 21.3(b) of the DSU, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, WT/DS381 (Sept. 17, 2012) [hereinafter *U.S.—Tuna II Compliance Report*]. The United States agreed to implement recommendations and rulings by July 13, 2013. *Id.* Status Report Regarding Implementation Regarding DSB Recommendations and Rulings in the Dispute, *United States—Measures Affecting the Production and Sale of Clove Cigarettes*, WT/DS406 (Dec. 6, 2012) [hereinafter *U.S.—Clove Cigarettes Compliance Report*].

³ See DANIEL C.K. CHOW & THOMAS J. SCHOENBAUM, *INTERNATIONAL TRADE LAW: PROBLEMS, CASES, AND MATERIALS* 52–53 (2008).

⁴ See Layton et al., *supra* note 1.

⁵ *Id.*; see also Michael Ming Du, *Domestic Regulatory Autonomy Under the TBT Agreement: From Non-Discrimination to Harmonization*, 6 CHINESE J. OF INT'L LAW 269, 270 (2007).

⁶ WTO SECRETARIAT, *World Trade Report 2012 Trade and Public Policies: A Closer Look at Non-Tariff Measures in the 21st Century*, 126–27 (2012), available at http://www.wto.org/english/res_e/booksp_e/anrep_e/world_trade_report12_e.pdf.

⁷ See *id.*

⁸ See Gregory Shaffer, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, 107 AM. J. INT'L L. 192, 192–99 (2013); Joost Pauwelyn, *COOL . . . But What Is Left Now for TBT Art. 2.2?*, INT'L ECON. L. AND POL'Y BLOG (July 3, 2012, 2:46 PM), <http://worldtradelaw.typepad.com/ielpblog/2012/07/cool-but-what-is-left-now-of-tbt-art-22.html>.

question was found to violate the non-discrimination obligations of Article 2.1, but not Article 2.2, which requires that regulations be no more “trade restrictive than necessary.”⁹ Articles 2.1 and 2.2 are not so closely related that violation of one necessarily implicates the other.¹⁰ But, considering the varying effects that the three regulations in question had on trade, and the Appellate Body’s analyses under each article, some international trade theorists have suggested that the Appellate Body purposively avoided finding a violation using necessity under Article 2.2 and instead relied too much on non-discrimination under Article 2.1.¹¹

This Note questions whether the Appellate Body actively avoided finding the measures in *U.S.–Clove Cigarettes*, *U.S.–Tuna II*, and *U.S.–COOL* inconsistent with Article 2.2 of the TBT Agreement and instead gave Article 2.1 too much force in order to find violations. Part I introduces the TBT Agreement and discusses its development. It also describes the factual contexts that gave rise to these three cases. Part II discusses the scope of the TBT Agreement before the three cases. It goes on to compare the Appellate Body’s Article 2.1 and Article 2.2 analyses in each case. Part III argues that the Appellate Body was more willing to find violations of the TBT Agreement using discrimination rather than necessity and theorizes why that was the case. Additionally, it argues that the Appellate Body’s unwillingness to find a violation under Article 2.2 appropriately protects the regulatory power of WTO members. Finally, it argues that the Appellate Body did not give Article 2.1 too much force; it instead applied an effective test that successfully balances the regulatory authority of WTO members with trade liberalization.

⁹ Appellate Body Report, *United States–Certain Country of Origin Labeling*, ¶¶ 350, 491, WT/DS384/AB/R, WT/DS386/AB/R (June 29, 2012) [hereinafter Appellate Body Report, *United States–COOL*]; Appellate Body Report, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 299, 331, WT/DS381/AB/R (May 16, 2012) [hereinafter Appellate Body Report, *United States–Tuna II*]; Appellate Body Report, *United States–Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 298, WT/DS406/AB/R (Apr. 4, 2012) [hereinafter Appellate Body Report, *United States–Clove Cigarettes*].

¹⁰ See Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, Apr. 15, 1994, 1867 U.N.T.S. 154 [hereinafter Marrakesh Agreement]; Agreement on Technical Barriers to Trade, arts. 2.1, 2.2, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, 1868 U.N.T.S. 120 [hereinafter TBT Agreement].

¹¹ See Pauwelyn, *supra* note 8.

I. BACKGROUND

A. *Origins of the TBT Agreement*

The WTO and its predecessor, the General Agreement on Tariffs and Trade (GATT), have been, and continue to be, successful in expanding international trade by eliminating protectionist policies like tariffs and quotas.¹² With this success, attention turned to less obvious trade barriers, such as domestic technical regulations.¹³ Technical regulations are product, labeling, and packaging requirements that must be met to sell a product in a certain domestic market.¹⁴ These requirements can restrict international trade by raising the cost of business for producers, who likely have to modify their products to satisfy the differing requirements imposed by different markets.¹⁵ Not surprisingly, States can design these technical regulations to protect domestic industry.¹⁶

Out of concern that technical regulations would be used as protectionist tools, the forty-three Contracting Parties of the GATT, at the conclusion of the 1979 Tokyo Round, signed the Standards Code.¹⁷ This code established the principle that technical regulations should not be used as barriers to trade.¹⁸ It also preserved the right of the Contracting Parties to protect the health, safety, and welfare of their people and their environment.¹⁹ The code attempted to achieve these principles by prohibiting discrimination through product specifications, using language similar to GATT Article III:4.²⁰ Additionally, the Standards

¹² See Robert Howse & Elizabeth Türk, *The WTO Impact Upon Internal Regulations: A Case Study of the Canada-EC Asbestos Dispute*, in TRADE AND HUMAN HEALTH AND SAFETY 77, 78–79 (G. Bermann & P. Mavroidis eds. 2006); PETROS C. MAVROIDIS, THE GENERAL AGREEMENT ON TARIFFS AND TRADE 7–9, (2005).

¹³ Howse & Türk, *supra* note 12, at 79–80; Ming Du, *supra* note 5, at 270.

¹⁴ MITSUO MATSUSHITA, THOMAS J. SHOENBAUM, & PETROS MAVROIDIS, THE WORLD TRADE ORGANIZATION: LAW, PRACTICE, AND POLICY 132 (2003).

¹⁵ See *id.* at 132; Howse & Türk, *supra* note 12, at 79.

¹⁶ Howse & Türk, *supra* note 12, at 79.

¹⁷ Gabrielle Marceau & Joel P. Trachtman, *A Map of the World Trade Organization Law of Domestic Regulation of Goods: The Technical Barriers to Trade Agreement, the Sanitary Phyto-Sanitary and the General Agreement on Tariffs and Trade*, in TRADE AND HUMAN HEALTH AND SAFETY, *supra* note 12, at 9, 12.

¹⁸ *Id.* at 11–12.

¹⁹ *Id.*; ANDREW LANG, WORLD TRADE LAW AFTER NEOLIBERALISM: RE-IMAGINING THE GLOBAL ECONOMIC ORDER 250 (2011).

²⁰ See General Agreement on Tariffs and Trade 1994, Art. III:4, Marrakesh Agreement Establishing the World Trade Organization, Annex 1A, 1867 U.N.T.S. 187 (“The products of the territory of any contracting party imported into the territory of any other contracting party shall be accorded treatment no less favourable than that accorded to like prod-

Code prohibited regulations from being more trade restrictive than necessary, and urged its Contracting Parties to harmonize their regulations using international standards and collaborations.²¹ But within a short amount of time, it was clear the Standards Code was not effectively achieving its purpose.²² This was due in large part to the fact that it was a “plurilateral agreement,” and thus only binding on the signing countries, who were at a relative disadvantage compared to non-signing GATT countries.²³

To remedy the failures of the Standards Code, the GATT parties developed the TBT Agreement and the Agreement on Sanitary and Phytosanitary Measures (SPS Agreement) in the Uruguay Round of negotiations.²⁴ The SPS Agreement explicitly addresses the health and safety measures intended to protect humans, animals, and plants from disease and food risks, whereas the TBT Agreement applies to all other technical regulations.²⁵ Both agreements were added as WTO obligations in a “single undertaking” with the signing of the Marrakesh Agreement Establishing the WTO.²⁶ Consequently, the TBT Agreement and SPS Agreement, unlike the Standards Code they replaced, are binding on all WTO Members.²⁷ Now every domestic regulation implemented by a WTO Member can be reviewed by the Dispute Settlement Body and can be deemed in violation of one of these treaties.²⁸ If the Dispute Settlement Body finds that a domestic regulation violates one of these treaties, the violating member must repeal or amend the

ucts of national origin in respect of all laws, regulations and requirements affecting their internal sale, offering for sale, purchase, transportation, distribution or use. The provisions of this paragraph shall not prevent the application of differential internal transportation charges which are based exclusively on the economic operation of the means of transport and not on the nationality of the product.”); Agreement on Technical Barriers to Trade, Mar. 1980, art. 2.1, GATT B.I.S.D. (26th Supp.) at 2 (1980) [hereinafter Standards Code] (“Products imported from the territory of any Party shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country in relation to such technical regulations or standards.”).

²¹ See Standards Code, *supra* note 20, arts. 2.1–4; LANG, *supra* note 19, at 250; Marceau & Trachtman, *supra* note 17, at 12.

²² Donna Roberts, *Preliminary Assessment of the Effects of the WTO Agreement on Sanitary and Phytosanitary Trade Regulations*, 1 J. ECON. L. 377, 380 (1998).

²³ Marceau & Trachtman, *supra* note 17, at 12.

²⁴ *Id.* at 13.

²⁵ WTO SECRETARIAT, GUIDE TO THE URUGUAY ROUND AGREEMENTS 62 (1999) [hereinafter WTO GUIDE]; see MATSUSHITA ET AL., *supra* note 14, at 12; Roberts, *supra* note 22, at 382.

²⁶ Marceau & Trachtman, *supra* note 17, at 13.

²⁷ *Id.*; WTO GUIDE, *supra* note 25, at 71.

²⁸ See WTO GUIDE, *supra* note 25, at 71.

regulation.²⁹ If the violating member fails to do so, the WTO will allow the complaining member to retaliate by suspending a WTO benefit.³⁰

Similar to the Standards Code, the WTO attempts to balance its members' regulatory concerns with its efforts to liberalize trade through the TBT Agreement.³¹ The preamble of the TBT Agreement states the purpose of the agreement is to "ensure that technical regulations and standards . . . do not create unnecessary obstacles to international trade;" it also notes, however, that "no country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices"³² It was uncertain how the WTO would go about balancing its TBT Agreement objectives.³³ *U.S.—Clove Cigarettes*, *U.S.—Tuna II*, and *U.S.—COOL* provided the first opportunities for the Appellate Body to analyze a dispute under key provisions of this Agreement.³⁴ Thus, these cases are significant because the rules they established will be applied to future TBT disputes.³⁵

B. Context for Interpreting the TBT: A Trio of Cases

1. Case One: *U.S.—Clove Cigarettes*

To reduce the number of young Americans who start to smoke, the United States House Energy and Commerce Committee proposed the Family Smoking Prevention and Tobacco Control Act (FSPTCA).³⁶ On June 22, 2009, President Obama signed the FSPTCA into law.³⁷ Because of this law, the production and sale of all flavored cigarettes are banned in the United States.³⁸ Although this law banned clove ciga-

²⁹ CHOW & SCHOENBAUM, *supra* note 3, at 52–53.

³⁰ *Id.*

³¹ See *id.* at 466–67; MATSUSHITA ET AL., *supra* note 14, at 132; WTO GUIDE, *supra* note 25, at 71.

³² TBT Agreement, *supra* note 10, pmbl.

³³ See Ming Du, *supra* note 5, at 283–84.

³⁴ Tania Voon, *International Decision: United States—Measure Affecting the Production and Sale of Clove Cigarettes*, 106 AM. J. INT'L L. 824, 828 (2012).

³⁵ See *id.*; Layton et al., *supra* note 1.

³⁶ H.R. REP. NO. 111-58, pt. 1, at 2–3, 37.

³⁷ Family Smoking Prevention and Tobacco Control Act, Pub. L. No. 111-31, 123 Stat. 1776 (2009) (codified in scattered sections of 21 U.S.C.); see Jeff Zeleny, *Occasional Smoker*, 47, *Signs Tobacco Bill*, N.Y. TIMES, June 23, 2009, at A15.

³⁸ Family Smoking Prevention and Tobacco Control Act, § 907 (a)(1)(A), 21 U.S.C. § 387(g)(a)(1)(A) (Supp. 2010).

rettes, it provided an exception for menthol cigarettes.³⁹ The United States claimed that the legislation excluded menthol cigarettes because more Americans, other than the youth, smoke them, and the effects of prohibiting them were not adequately evaluated.⁴⁰

Menthol cigarettes are primarily produced in the United States, whereas clove cigarettes are primarily produced in Indonesia.⁴¹ Indonesia challenged this law as inconsistent with several WTO obligations, including Articles 2.1 and 2.2 of the TBT Agreement.⁴² The Panel and Appellate Body each found the cigarette ban inconsistent with Article 2.1 of the TBT Agreement.⁴³ The Panel found the cigarette ban consistent with Article 2.2, and Indonesia did not appeal that ruling.⁴⁴ The United States, however, appealed the Panel's ruling that the cigarette ban violated Article 2.1.⁴⁵ Using different reasoning, the Appellate Body upheld the Panel's ruling.⁴⁶

2. Case Two: *U.S.–Tuna II*

In 2009, Mexico challenged the consistency of the United States' dolphin-safe labeling scheme under the Dolphin Protection Consumer Information Act, its regulations, and the *Earth Island Institute v. Hogarth* decision with the TBT Agreement.⁴⁷ This labeling scheme was primar-

³⁹ *Id.*

⁴⁰ First Written Submission of the United States, *United States–Measures Affecting the Production and Sale of Clove Cigarettes*, ¶¶ 148–150, WT/DS406 (Nov. 16, 2010), available at http://www.ustr.gov/webfm_send/2396 [hereinafter U.S. First Written Submission].

⁴¹ Press Release, World Trade Org., U.S. Blocks Indonesian Request for Panel on Clove Cigarettes (June 22, 2010), available at http://www.wto.org/english/news_e/news10_e/dsb_22jun10_e.htm [hereinafter WTO Press Release]. Indonesia stated that over six million Indonesians depend directly or indirectly on clove cigarette production. *Id.*

⁴² See Request for the Establishment of a Panel by Indonesia, *United States–Measures Affecting the Production and Sale of Clove Cigarettes*, 1–2, WT/DS406/2 (June 11, 2010) [hereinafter Indonesia's Panel Request].

⁴³ Appellate Body Report, *United States–Clove Cigarettes*, *supra* note 9, ¶ 234; see Panel Report, *United States–Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 7.293, WT/DS406/R (Sep. 2, 2011) [hereinafter Panel Report, *United States–Clove Cigarettes*].

⁴⁴ Panel Report, *United States–Clove Cigarettes*, *supra* note 43, ¶¶ 7.429–432; Tania Voon, *The WTO Appellate Body Outlaws Discrimination in U.S. Flavored Cigarette Ban*, 16 AM. SOC'Y INT'L L. (Apr. 30, 2012), available at <http://www.asil.org/insights120430.cfm>.

⁴⁵ See Appellant Submission of the United States, *United States–Measures Affecting the Production and Sale of Clove Cigarettes*, ¶ 70, WT/DS406, (Jan. 5, 2012), available at http://www.ustr.gov/webfm_send/3225 [hereinafter U.S. *Clove Appeal*].

⁴⁶ See Appellate Body Report, *United States–Clove Cigarettes*, *supra* note 9, ¶ 234.

⁴⁷ See Request for the Establishment of a Panel by Mexico, *United States–Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, 1–2, WT/DS381/4 (Mar. 10, 2009) [hereinafter Mexico's *Tuna II* Panel Request]; Dolphin Protection Con-

ily designed to prevent harmful tuna fishing practices in the Eastern Tropical Pacific (ETP).⁴⁸ In the ETP, tuna schools frequently swim underneath dolphins; consequently, tuna trawlers set their nets on the dolphins to catch the schools below.⁴⁹ This fishing practice risks seriously injuring or killing dolphins.⁵⁰ Accordingly, the requirements to obtain a “dolphin-safe” label under the U.S. scheme for tuna caught in the ETP are stricter than for tuna caught elsewhere.⁵¹

Mexico argued that the labeling scheme prevented its tuna products, which primarily consist of tuna caught by setting on dolphins in the ETP, from being deemed “dolphin-safe” even though they are harvested in a way considered dolphin safe by a multilateral agreement with the United States.⁵² Additionally, Mexico argued that tuna products from other countries, including the United States, get the “dolphin-safe” label under less rigorous requirements.⁵³ The Panel concluded that the United States labeling scheme was consistent with Article 2.1, but inconsistent with Article 2.2.⁵⁴ Both Mexico and the United States appealed.⁵⁵ The Appellate Body reversed, finding the labeling scheme inconsistent with Article 2.1, but consistent with Article 2.2.⁵⁶

3. Case Three: *U.S.–COOL*

In *U.S.–COOL*, Canada and Mexico, using the TBT Agreement, challenged the United States’ country of origin labeling scheme for

sumer Information Act, 16 U.S.C. § 1385 (2012); *Earth Island Inst. v. Hogarth*, 494 F.3d 757 (9th Cir. 2007).

⁴⁸ Shaffer, *supra* note 8, at 196.

⁴⁹ *Id.* at 193.

⁵⁰ *Id.*

⁵¹ See Elizabeth Trujillo, *The Tuna-Dolphin Encore—WTO Rules on Environmental Labeling*, ASIL INSIGHT (Mar. 7, 2012), <http://www.asil.org/insights/volume/16/issue/7/tuna-dolphin-encore-wto-rules-environmental-labeling>.

⁵² See Mexico’s *Tuna II* Panel Request, *supra* note 47, at 1; Shaffer, *supra* note 8, at 193.

⁵³ See Mexico’s *Tuna II* Panel Request, *supra* note 47, at 1–2; Shaffer, *supra* note 8, at 193.

⁵⁴ Panel Report, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, ¶¶ 7.377–378, 7.618–621, WT/DS381/R (Sep. 15, 2011) [hereinafter Panel Report, *United States—Tuna II*].

⁵⁵ See Appellant Submission of the United States, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, 24, WT/DS381, (Jan. 20, 2012), available at http://www.ustr.gov/webfm_send/3251 [hereinafter U.S. *Tuna II* Appeal]; Notification of an Other Appeal by Mexico, *United States—Measures Concerning the Importation, Marketing and Sale of Tuna and Tuna Products*, 1–2, WT/DS381/11, (Jan. 27, 2012) [hereinafter Mexico *Tuna II* Appeal].

⁵⁶ Appellate Body Report, *United States—Tuna II* *supra* note 9, ¶¶ 298–299, 331.

muscle cut meats, known as the COOL measure.⁵⁷ The COOL measure consists of the following United States' laws: the Agricultural Marketing Act of 1964, as amended by the 2002 Farm Bill and 2008 Farm Bill, the Agricultural Marketing Service Interim Rule, and the Final Rule 2009.⁵⁸ This measure requires muscle cut meat to be labeled in one of four ways.⁵⁹ Label A is for meat that is born, raised, and slaughtered in the United States.⁶⁰ Label B is for meat with multiple countries of origins, for instance, animals born in Mexico or Canada, but raised and slaughtered in the United States.⁶¹ Label C is for meat from animals, not born or raised in the United States, but imported there for immediate slaughter.⁶² Finally, Label D is for meat from animals neither born, raised, nor slaughtered in the United States.⁶³ Producers that mix meat from animals of different origin on the same production day, a practice known as commingling, can choose their appropriate label, usually Label B or C.⁶⁴ The objective of this measure was to provide consumers with more information about the origins of their meat products.⁶⁵ The Panel found the COOL measure violated the national treatment obligation of Article 2.1 and violated Article 2.2.⁶⁶ The Appellate Body upheld the Panel's Article 2.1 ruling, but reversed its ruling under Article 2.2.⁶⁷

⁵⁷ See Constitution of the Panel Established at the Requests of Canada and Mexico, *United States—Certain Country of Origin Labeling Requirements*, 1–2, WT/DS384/9, WT/DS386/8 (May 11, 2010) [hereinafter COOL Panel Established]; Request for the Establishment of a Panel by Canada, *United States—Certain Country of Origin Labeling Requirements*, at 1–2, WT/DS384/8 (Oct. 9, 2009) [hereinafter Canada's Panel Request].

⁵⁸ Panel Report, *United States—Certain Country of Origin Labeling*, ¶¶ 7.34, 7.45, WT/DS384/R/WT/DS386/R (Nov. 18, 2011) [hereinafter Panel Report, *United States—COOL*]; Joshua Meltzer, *The WTO Ruling on U.S. Country of Origin Labeling ("COOL")*, n. 4, 16 AM. SOC'Y INT'L LAW (July 18, 2012), available at <http://www.asil.org/sites/default/files/insight120718.pdf>; 7 U.S.C. § 1638a (2012); Agricultural Marketing Service, USDA, 74 Fed. Reg. 10, 2670 (2009).

⁵⁹ Panel Report, *United States—COOL*, *supra* note 58, ¶ 7.89.

⁶⁰ 7 U.S.C. § 1638a (2)(A) (2012); Panel Report, *United States—COOL*, *supra* note 58, ¶ 7.89.

⁶¹ 7 U.S.C. § 1638a (2)(B); Panel Report, *United States—COOL*, *supra* note 58, ¶ 7.89; Meltzer, *supra* note 58.

⁶² 7 U.S.C. § 1638a (2)(C); Panel Report, *United States—COOL*, *supra* note 58, ¶ 7.89.

⁶³ 7 U.S.C. § 1638a (2)(D); Panel Report, *United States—COOL*, *supra* note 58, ¶ 7.89.

⁶⁴ See Agricultural Marketing Service, USDA, 74 Fed. Reg. 10, 2670 (2009); Meltzer, *supra* note 58.

⁶⁵ First Written Submission of the United States, *United States—Certain Country of Origin Labeling*, ¶¶ 206–225, WT/DS384/386 (Aug. 4, 2010) [hereinafter COOL U.S. First Written Submission].

⁶⁶ Panel Report, *United States—COOL*, *supra* note 58, ¶¶ 7.548, 7.720.

⁶⁷ Appellate Body Report, *United States—COOL*, *supra* note 9, ¶¶ 350, 470.

II. DISCUSSION

A. *Scope of the TBT Agreement*

1. Technical Regulations

As a threshold matter, the TBT Agreement is applicable in a dispute only if the measure in question is a “technical regulation.”⁶⁸ A technical regulation, as defined by Annex 1.1 of the TBT Agreement, is a document that applies to an identified product, which details one or more characteristics of the product, and requires compliance with those product characteristics.⁶⁹ For example, in *U.S.—Clove Cigarettes*, the Panel found the United States’ flavored cigarette ban to be a technical regulation because the law expressly identifies the products it covered, “cigarettes and any of their component parts;” it identifies product characteristics in the negative form: “a cigarette . . . shall not contain;” and it is mandatory.⁷⁰ Similarly, in *U.S.—COOL*, the Panel concluded that the United States’ country of origin labeling measure met the requirements to be a technical regulation under the TBT Agreement.⁷¹ The COOL measure applies to an identified group of products, muscle cut beef or pork; it lays down product characteristic by requiring a country of origin label on the identified products; and that characteristic is enforced with fines indicating mandatory compliance.⁷²

The Standards Code only applied to regulations that affected the physical product itself.⁷³ The TBT Agreement, by contrast, also applies to regulations that affect the process by which the product is made or procured—also known as a product’s process and production methods (PPMs).⁷⁴ After defining a technical regulation, Annex 1.1 states “[i]t may also include or deal exclusively with terminology, symbols, packaging, marking or labeling requirements as they apply to a product, process or production method.”⁷⁵ For example, in *U.S.—Tuna II*, the Appellate Body upheld the Panel’s finding that the United States labeling scheme for tuna products was a technical regulation because it details

⁶⁸ Ming Du, *supra* note 5, at 285.

⁶⁹ TBT Agreement, *supra* note 10, annex 1.1; *see also* Appellate Body Report, *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, ¶¶ 66–68, WT/DS135/AB/R (Mar. 12, 2001) [hereinafter Appellate Body Report, *EC—Asbestos*].

⁷⁰ Panel Report, *United States—Clove Cigarettes*, *supra* note 43, ¶¶ 7.27–28, 7.31–32, 7.39–41.

⁷¹ *See* Panel Report, *United States—COOL*, *supra* note 58, ¶ 7.216.

⁷² *Id.* ¶¶ 7.156–62, 7.207, 7.214.

⁷³ WTO GUIDE, *supra* note 25, at 72.

⁷⁴ *Id.*

⁷⁵ TBT Agreement, *supra* note 10, annex 1.1.

one legal definition for “dolphin-safe” labeled tuna, specifies the conditions that must be satisfied to use that label, and prevents alternate labels concerning the safety of dolphins to be used if the specified conditions are unmet.⁷⁶ The identified product is dolphin-safe tuna.⁷⁷ The detailed characteristic is that the tuna cannot be caught using the fishing practice known as “setting on dolphins” in the ETP, and this characteristic is mandatory because it constitutes the sole way to achieve the “dolphin-safe” label for tuna caught in the ETP.⁷⁸

2. Article 2.1—National Treatment and Most-Favored Nation

One of the main purposes for establishing the TBT Agreement was to prevent countries from protecting domestic industries by using technical regulations to discriminate against imported products.⁷⁹ Thus, to prevent protectionism through discrimination, the WTO drafters incorporated the GATT principles of national treatment and Most-Favored Nation (MFN) status in Article 2.1 of the TBT Agreement.⁸⁰ Accordingly, Article 2.1 states, “[m]embers shall ensure that in respect of technical regulations, products imported from the territory of any Member shall be accorded treatment no less favourable than that accorded to like products of national origin and to like products originating in any other country.”⁸¹ Consequently, technical regulations must treat imported products no less favorably than like domestic products and no less favorably than like imported products from any other country.⁸²

Article 2.1 is similar to the national treatment (Article I) and MFN (Article III) provisions of the GATT in that its national treatment and MFN obligations proscribe less favorable treatment of like products.⁸³ But how closely Article 2.1 followed the jurisprudence of the GATT had

⁷⁶ Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶ 199; *see also* Shaffer, *supra* note 8, at 195–96.

⁷⁷ *See* Appellate Body Report, *United States–Tuna II* *supra* note 9, ¶ 199.

⁷⁸ *See* Panel Report, *United States–Tuna II*, *supra* note 54, ¶¶ 7.76, 7.144; *see also* Elizabeth Trujillo, *The WTO Appellate Body Knocks Down U.S. “Dolphin-Safe” Tuna Labels but Leaves a Crack for PPMs*, ASIL INSIGHT (July 26, 2012), <http://www.asil.org/insights/volume/16/issue/25/wto-appellate-body-knocks-down-us-%E2%80%9Cdolphin-safe%E2%80%9D-tuna-labels-leaves>.

⁷⁹ *See* TBT Agreement, *supra* note 10, pmb1.

⁸⁰ *See* WTO GUIDE, *supra* note 25, at 72–73.

⁸¹ TBT Agreement, *supra* note 10, art. 2.1.

⁸² *See id.*; WTO GUIDE, *supra* note 25, at 73.

⁸³ *See* TBT Agreement, *supra* note 10, art. 2.1; General Agreement on Tariffs and Trade, arts. I, III, Oct. 30, 1947, 61 Stat. A-11, 55 U.N.T.S. 194 [hereinafter GATT 1947].

yet to be decided.⁸⁴ Before *U.S.—Clove Cigarettes*, no case dealt specifically with Article 2.1.⁸⁵ Thus, the scope of the provision was a matter of debate.⁸⁶ One main difference between the GATT obligations and Article 2.1 is that the GATT provides affirmative defenses for violations in its Article XX exceptions, like XX(b), which allows a violation if it is “necessary for the protection of human, animal or plant life or health.”⁸⁷ The TBT Agreement does not contain any similar provisions.⁸⁸ Without exception provisions, it was unclear how the WTO would be able to successfully interpret Article 2.1 to achieve its purpose of protecting legitimate regulation while preventing unnecessary barriers to trade.⁸⁹

3. Article 2.2—Necessity Test

Besides attempting to prevent protectionism through discriminatory technical regulations in Article 2.1, the TBT Agreement also demands in Article 2.2 that technical regulations not be created to unnecessarily obstruct trade.⁹⁰ This provision encompasses the object and purpose of the TBT Agreement by proscribing obstacles to trade, but only those considered unnecessary to attain legitimate objectives.⁹¹ Accordingly, Article 2.2 states:

Members shall ensure that technical regulations are not prepared, adopted or applied with a view to or with the effect of creating unnecessary obstacles to international trade. For this purpose, technical regulations shall not be more trade-restrictive than necessary to fulfill a legitimate objective, taking account of the risks non-fulfillment would create. Such legitimate objectives are, *inter alia*: national security requirements; the prevention of deceptive practices; protection of human health or safety, animal or plant life or health, or the environment. In assessing such risks, relevant elements of consideration are, *inter alia*: available scientific and technical

⁸⁴ See Panel Report, *United States—Clove Cigarettes*, *supra* note 43, ¶ 7.80.

⁸⁵ *Id.*

⁸⁶ See Howse & Türk, *supra* note 12, at 101; Marceau & Trachtman, *supra* note 17, at 19–20.

⁸⁷ GATT 1947, *supra* note 83, art. XX.

⁸⁸ Marceau & Trachtman, *supra* note 17, at 19–20.

⁸⁹ See Howse & Türk, *supra* note 12, at 101; Marceau & Trachtman, *supra* note 17, at 19–20.

⁹⁰ TBT Agreement, *supra* note 10, art. 2.2; WTO GUIDE, *supra* note 25, at 73.

⁹¹ See WTO GUIDE, *supra* note 25, at 72.

information, related processing technology or intended end-uses of products.⁹²

Article 2.2 seems to follow other WTO “necessity” provisions, like GATT Article XX (a), (b), and (d), and Article 5.6 of the SPS Agreement, but how closely it follows these other provisions was a matter of debate.⁹³ Similar to Article 2.1, the DSB had not fully analyzed a dispute under Article 2.2 until 2012.⁹⁴ One textual difference between the provisions is that Article 2.2 requires consideration of “the risks of non-fulfillment” of the member’s legitimate objective when deciding whether a regulation is necessary.⁹⁵ Neither GATT Article XX, nor Article 5.6 of the SPS Agreement include this requirement.⁹⁶ Additionally, GATT Article XX explicitly lists the objectives considered legitimate to the exclusion of all others, whereas, the phrase “*inter alia*” in Article 2.2 indicates that its list of legitimate objectives is not exhaustive.⁹⁷ Before a dispute was analyzed under Article 2.2, however, the provision’s scope was just conjecture.⁹⁸

B. *The Panel and Appellate Body Decisions*

1. *U.S.—Clove Cigarettes* Article 2.1 National Treatment Discrimination

U.S.—Clove Cigarettes marked the first time in the history of the WTO that the Panel invalidated a technical regulation under Article 2.1 of the TBT Agreement.⁹⁹ The Panel found the United States’ flavored

⁹² TBT Agreement, *supra* note 10, art. 2.2.

⁹³ See GATT 1947, *supra* note 83, art. XX; Agreement on the Application of Sanitary and Phytosanitary Measures, Marrakesh Agreement Establishing the World Trade Organization, 1867 U.N.T.S. 493, [hereinafter SPS Agreement], art. 5.6; see also Marceau & Trachtman, *supra* note 17, at 22–30.

⁹⁴ See Panel Report, *United States—Clove Cigarettes*, *supra* note 43, ¶ 7.329. Article 2.2 was discussed briefly in *European Communities—Measures Affecting Asbestos and Asbestos-Containing Products*, and *European Communities—Trade Description of Sardines*, but the disputes were not analyzed under Article 2.2. See Appellate Body Report, *EC—Asbestos*, *supra* note 69, ¶ 83; Appellate Body Report, *European Communities—Trade Description of Sardines*, ¶¶ 312–313, WT/DS231/AB/R (Sep. 26, 2002) [hereinafter Appellate Body Report, *EC—Sardines*].

⁹⁵ See SPS Agreement, *supra* note 93, art. 5.6; TBT Agreement, *supra* note 10, art. 2.2; GATT 1947, *supra* note 83, art. XX.

⁹⁶ See SPS Agreement, *supra* note 93, art. 5.6; TBT Agreement, *supra* note 10, art. 2.2; GATT 1947, *supra* note 83, art. XX.

⁹⁷ Howse & Türk *supra* note 12, at 105. Article 5.6 of the SPS Agreement only deals with sanitary and phyto-sanitary objectives. See SPS Agreement, *supra* note 93, art. 5.6.

⁹⁸ See Howse & Türk, *supra* note 12, at 105–110; Marceau & Trachtman, *supra* note 17, at 28–29; BENN MCGRADY, *TRADE AND PUBLIC HEALTH: THE WTO, TOBACCO, ALCOHOL, AND DIET* 206–13 (2011); Ming Du, *supra* note 5, at 290–91.

⁹⁹ See Panel Report, *United States—Clove Cigarettes*, *supra* note 43, ¶¶ 7.80, 7.293.

cigarette ban inconsistent with Article 2.1 because it treated imported clove cigarettes less favorably than domestic menthol cigarettes.¹⁰⁰ Unsurprisingly, the United States appealed this ruling.¹⁰¹

Using the text of Article 2.1, the Appellate Body concluded that for a measure to be inconsistent with the national treatment obligation of Article 2.1, it must be a technical regulation, the imported and domestic products must be like products, and the imported products must be treated less favorably than domestic products.¹⁰² The Panel concluded the cigarette ban was a technical regulation, and the United States did not appeal that specific finding.¹⁰³

The United States did appeal the Panel's finding that clove and menthol cigarettes are like products.¹⁰⁴ Essentially, the United States argued that the Panel failed to do a complete analysis and comparison of consumer taste and habits and end-uses between clove and menthol cigarettes.¹⁰⁵ The Appellate Body upheld the Panel's findings of likeness, relying on GATT Article III jurisprudence, which accords little weight to the policy behind the questioned measure.¹⁰⁶ In terms of end-uses, the Appellate Body emphasized that the analysis should consider the uses a product is capable of performing, and, consequently, accepted the United States' recommended end-uses for cigarettes: fulfilling a nicotine addiction; and providing pleasurable tastes and smells.¹⁰⁷ According to the Appellate Body, imported clove cigarettes and domestic menthol cigarettes share these end-uses.¹⁰⁸ In terms of consumer tastes and preferences, the Appellate Body agreed with the United States that the Panel should not have limited its analysis only to youth smokers.¹⁰⁹ Nevertheless, because both clove and menthol cigarettes are used for the purpose of starting to smoke, the Appellate Body found there was still enough substitutability between the products to find likeness.¹¹⁰

¹⁰⁰ *Id.* ¶¶ 7.28–293.

¹⁰¹ See U.S. *Clove Appeal*, *supra* note 45, ¶ 70.

¹⁰² Appellate Body Report, *United States–Clove Cigarettes*, *supra* note 9, ¶ 87.

¹⁰³ *Id.*; Panel Report, *United States–Clove Cigarettes*, *supra* note 43, ¶¶ 7.27–28, 7.31–32, 7.39–41.

¹⁰⁴ See U.S. *Clove Appeal*, *supra* note 45, ¶¶ 103–107.

¹⁰⁵ *Id.* ¶ 42.

¹⁰⁶ See Appellate Body Report, *United States–Clove Cigarettes*, *supra* note 9, ¶¶ 109–112, 120; Voon, *supra* note 34, at 824.

¹⁰⁷ Appellate Body Report, *United States–Clove Cigarettes*, *supra* note 9, ¶¶ 129–132.

¹⁰⁸ *Id.* ¶ 132.

¹⁰⁹ *Id.* ¶¶ 144–145.

¹¹⁰ *Id.* ¶ 144.

Similarly, in regards to less favorable treatment under Article 2.1, the Appellate Body upheld the Panel's finding.¹¹¹ Drawing from GATT Article III jurisprudence, the Appellate Body stated that, to find less favorable treatment, a panel should determine whether the technical regulation damages the competitive opportunities for an imported product by modifying market conditions.¹¹² Noting that the TBT Agreement does not contain exception provisions, like GATT Article XX, the Appellate Body further stated that Article 2.1 does not prohibit less favorable treatment that "stems exclusively from a legitimate regulatory distinction."¹¹³ The United States' appeal questioned the Panel's finding that the harm to clove cigarettes was not explained by legitimate regulatory distinctions.¹¹⁴ The Appellate Body agreed with the Panel that the reasons cited for exempting menthol cigarettes—that more people are addicted to them and thus banning them could increase healthcare costs and expand the cigarette black market—are not "legitimate regulatory distinctions."¹¹⁵ The Appellate Body noted that the addictive ingredient in menthol cigarettes, nicotine, is also present in regular cigarettes.¹¹⁶ Further, the United States did not have evidence to prove that menthol smokers would not switch to regular cigarettes if menthol cigarettes were banned.¹¹⁷

Consequently, the Appellate Body concluded that the cigarette ban failed the Article 2.1 "less favorable treatment" test.¹¹⁸ The test was designed to "balance [a WTO Member's] right to regulate with [its] obligation not to discriminate."¹¹⁹ With its test, the Appellate Body wanted to stress that less favorable treatment is not simply shown by any uneven effect on imports.¹²⁰ Instead, "the design, architecture, revealing structure, operation, and application of the technical regulation at issue, and, in particular, whether that technical regulation is even-

¹¹¹ *See id.* ¶¶ 222, 233.

¹¹² *See id.* ¶¶ 180–182.

¹¹³ *Id.* ¶¶ 101, 180–182.

¹¹⁴ *See id.* ¶ 219; U.S. *Clove Appeal*, *supra* note 45, ¶¶ 103–107.

¹¹⁵ Appellate Body Report, *United States–Clove Cigarettes*, *supra* note 9, ¶ 225.

¹¹⁶ *Id.*

¹¹⁷ *See id.*

¹¹⁸ *Id.* ¶¶ 215, 224–226; BENN MCGRADY, TOBACCO PRODUCT REGULATION AND THE WTO: APPELLATE BODY REPORT, *US–CLOVE CIGARETTES* 5 (2012), available at <http://www.oneinstituteoftradeblog.org/wp-content/uploads/2012/04/briefing-paper.pdf>.

¹¹⁹ Appellate Body Report, *United States–Clove Cigarettes*, *supra* note 9, ¶¶ 174–175; MCGRADY, *supra* note 118, at 5.

¹²⁰ *See* Appellate Body Report, *United States–Clove Cigarettes*, *supra* note 9, ¶ 174; MCGRADY, *supra* note 118, at 5.

handed” must all be considered.¹²¹ Using that test, the Appellate Body concluded that the cigarette ban as a whole appeared discriminatory and caused a disparate impact on Indonesian clove cigarettes.¹²²

Finally, the Appellate Body was quick to note that, although it found the cigarette ban inconsistent with Article 2.1, this conclusion did not mean that WTO Members could not prohibit tobacco products or implement other public health regulations.¹²³ In fact, the Appellate Body stated that the United States can continue to ban clove cigarettes as long as it complies with the TBT Agreement.¹²⁴

2. *U.S.–Tuna II*: Adding Proportionality to the Article 2.1 Test

a. *Article 2.1 National Treatment and MFN Discrimination*

The Panel released its report in *U.S.–Tuna II* in 2011, and, unlike the Panel in *U.S.–Clove Cigarettes*, it concluded that the technical regulation at issue was consistent with Article 2.1.¹²⁵ It came to this conclusion because the technical regulation set the same requirements for tuna products from any country, and thus was “origin-neutral.”¹²⁶ Consequently, according to the Panel, any harmful impact on Mexican tuna products was not a result of the technical regulation but a result of the decisions, including economic and marketing decisions, made by Mexican fishers and canners.¹²⁷ Mexico appealed this finding¹²⁸ and, subsequently, the Appellate Body reversed it.¹²⁹

Using its analysis from *U.S.–Clove Cigarettes* and GATT Article III jurisprudence, the Appellate Body emphasized that any detrimental impact on the competitive opportunities for imported products due to a measure should be considered under Article 2.1.¹³⁰ According to the Appellate Body, just because a measure is origin-neutral on its face does not mean the measure does not treat imported like products less favorably.¹³¹ The Appellate Body went on to complete the correct Article

¹²¹ Appellate Body Report, *United States–Clove Cigarettes*, *supra* note 9, ¶ 215.

¹²² *See id.* ¶ 224.

¹²³ *Id.* ¶ 235.

¹²⁴ *Id.* ¶ 236.

¹²⁵ Panel Report, *United States–Tuna II*, *supra* note 54, ¶¶ 7.377–.378.

¹²⁶ *Id.* ¶ 7.377.

¹²⁷ *Id.* ¶ 7.378.

¹²⁸ *See Mexico Tuna II Appeal*, *supra* note 55, at 1–2.

¹²⁹ Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶¶ 298–299.

¹³⁰ *Id.* ¶¶ 214, 225–227.

¹³¹ *Id.* ¶ 225.

2.1 test established in *U.S.—Clove Cigarettes*.¹³² The technical regulation and like products prongs were already satisfied, so the Appellate Body moved on to the less favorable treatment prong, which it evaluated in two steps.¹³³

First, the Appellate Body determined that the technical regulation did in fact harm the competitive opportunities for Mexican tuna products because, as a result of the measure, Mexican canners were unable to sell tuna with a “dolphin-safe” label.¹³⁴ Consequently, they were unable to appeal to the majority of U.S. tuna consumers.¹³⁵

Next, the Appellate Body determined whether the harm to the competitive opportunities of Mexican tuna products reflects discrimination on the part of the United States or is the result of legitimate regulatory distinctions.¹³⁶ In analyzing this prong of the test, the Appellate Body considered the objectives of these labeling requirements, which, according to the United States and confirmed by the Panel, are to ensure that consumers know whether their tuna was caught in a way harmful to dolphins, and to use the U.S. market to encourage dolphin safe tuna fishing.¹³⁷ Because the labeling requirements are stricter for tuna caught within the ETP than outside it, the Appellate Body determined whether the measure was sufficiently “calibrated” to respond to the risks dolphins face inside and outside the ETP.¹³⁸ The United States argued that the stricter requirements for the ETP were due to the fact that the dolphin-tuna relationship is stronger there, and thus more dolphins are likely to be hurt or killed.¹³⁹

The Panel, however, rejected that argument.¹⁴⁰ In upholding the Panel’s findings, the Appellate Body determined that the differing treatment in the measure was not proportionality calibrated to respond to the varying risks dolphins face from tuna fishing all over the globe.¹⁴¹ Consequently, it held that the harmful effects on the competitive opportunities for Mexican tuna products imported to America as a

¹³² *Id.* ¶¶ 230–231.

¹³³ *Id.*

¹³⁴ *Id.* ¶¶ 233, 239–240.

¹³⁵ *Id.*

¹³⁶ *Id.* ¶¶ 240–243.

¹³⁷ *Id.* ¶ 242.

¹³⁸ *Id.* ¶¶ 282–297.

¹³⁹ See *U.S. Tuna II Appeal*, *supra* note 55, ¶ 96.

¹⁴⁰ Panel Report, *United States—Tuna II*, *supra* note 54, ¶ 7.562.

¹⁴¹ Appellate Body Report, *United States—Tuna II*, *supra* note 9, ¶¶ 293–297.

result of this technical regulation do not “stem from legitimate regulatory distinctions.”¹⁴²

Accordingly, the Appellate Body ruled the United States’ tuna labeling scheme violated Article 2.1 for treating Mexican tuna products less favorably than domestic tuna and tuna imported from other countries.¹⁴³

b. *Article 2.2: Necessity Analysis*

The Panel in *U.S.–Tuna II* concluded that the United States tuna-labeling scheme was “more trade restrictive than necessary” to fulfill its legitimate objective and thus violated Article 2.2 of the TBT Agreement.¹⁴⁴ It came to this conclusion by citing the documented risks dolphins face outside the ETP, and subsequently determining that the labeling scheme only partially satisfies its two objectives: (i) informing consumers about whether their tuna was harmful to dolphins and (ii) using the United States market to promote dolphin safe fishing.¹⁴⁵ Next, the Panel decided that an alternative proposed by Mexico, using the Agreement on International Dolphin Conservation Program’s (AIDCP) “dolphin-safe” label, which came out of a 1998 multilateral agreement with the United States, in conjunction with the existing DPCIA label, was a less trade restrictive alternative that would equally fulfill the United States’ objectives.¹⁴⁶ This alternative would allow tuna caught by setting on dolphins in the ETP to be eligible for an AIDCP “dolphin-safe” label.¹⁴⁷

The Appellate Body reversed this finding.¹⁴⁸ First, the Appellate Body stated that in order to conduct an Article 2.2 analysis, WTO panels need to weigh: “(i) the degree of contribution made by the measure to the legitimate objective at issue; (ii) the trade-restrictiveness of the measure; and (iii) the nature of the risks at issue and the gravity of consequences that would arise from non-fulfillment of the objective(s) pursued by the Member through the measure.”¹⁴⁹ The Appellate Body also

¹⁴² *Id.* ¶ 297.

¹⁴³ *Id.* ¶ 299.

¹⁴⁴ Panel Report, *U.S.–Tuna II*, *supra* note 54, ¶¶ 7.618–621.

¹⁴⁵ *Id.* ¶¶ 7.562–564, 7.599–600.

¹⁴⁶ *Id.* ¶¶ 7.618–619.

¹⁴⁷ *Id.* ¶¶ 7.571–573 (stating that the tuna would still have to meet the AIDCP requirements including having an observer certify that no dolphins were killed or hurt in the catch.); Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶ 329.

¹⁴⁸ Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶¶ 330–331.

¹⁴⁹ *Id.* ¶ 322.

noted that this analysis frequently should include a comparison between the measure at issue and a possible alternative measure.¹⁵⁰ The burden is on the complainant to show that the measure is “more trade restrictive than necessary.”¹⁵¹ To meet its burden, according to the Appellate Body, the complainant could offer an alternative measure that is less restrictive.¹⁵²

Using the Panel’s analysis of Mexico’s proposed alternative, the Appellate Body moved on to determine whether the alternative the Panel approved sufficiently satisfied the United States’ objective.¹⁵³ The Appellate Body criticized the Panel for including tuna caught outside the ETP in its evaluation of the alternative measure.¹⁵⁴ The alternative proposed by Mexico only changed conditions within the ETP.¹⁵⁵ Accordingly, the Appellate Body stated that the Panel should have limited its comparison to conditions solely within the ETP as well.¹⁵⁶ Within the ETP, the Appellate Body concluded that the existing United States labeling scheme fulfills its objective to a greater degree than Mexico’s alternative would, because even when dolphins are not killed during a setting, harm to the dolphins can still occur, like cow-calf separation, stress, and injury.¹⁵⁷ Consequently, because Mexico’s alternative did not match the degree of contribution to the United States’ objective accomplished by the challenged labeling scheme, the Appellate Body reversed the Panel’s finding and deemed the United States’ tuna labeling scheme consistent with Article 2.2.¹⁵⁸

Even though the Appellate Body found the measure inconsistent with Article 2.1, Mexico is not likely to benefit significantly from that concession.¹⁵⁹ Because the measure is consistent with Article 2.2, the United States only has to make its labeling requirements outside the ETP match the tougher requirements inside the ETP in order to comply with the ruling.¹⁶⁰ Mexico’s tuna products primarily come from setting on dolphins inside the ETP, so the United States complying with the Appellate Body’s ruling will probably not help Mexican tuna prod-

¹⁵⁰ *Id.*

¹⁵¹ *Id.* ¶ 323.

¹⁵² *Id.*

¹⁵³ *Id.* ¶¶ 328–331; Shaffer, *supra* note 8, at 196.

¹⁵⁴ Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶¶ 328, 331.

¹⁵⁵ *Id.* ¶¶ 329–331.

¹⁵⁶ *Id.*

¹⁵⁷ *Id.* ¶¶ 329–331, n.663.

¹⁵⁸ *Id.*

¹⁵⁹ See Shaffer, *supra* note 8, at 197–98.

¹⁶⁰ See *id.* at 197.

ucts attain the “dolphin-safe” label.¹⁶¹ The Panel’s ruling was more beneficial to Mexico because it would have allowed Mexican tuna products to be labeled “dolphin-safe” in the U.S. market using the AIDCP label.¹⁶²

3. *U.S.–COOL*: Adding a *Chapeau* Test

a. *Article 2.1 Analysis*

The Panel in *U.S.–COOL* concluded that the COOL measure violated the TBT Agreement’s national treatment obligation in Article 2.1.¹⁶³ It came to its conclusion after evaluating the measure under its three-prong test.¹⁶⁴ First, the Panel found the COOL measure to be a technical regulation.¹⁶⁵ Next, the Panel determined that the products affected by the measure were like products.¹⁶⁶ Specifically finding that Canadian cattle, Mexican cattle, and U.S. cattle are like products, and Canadian hogs and U.S. hogs are like products.¹⁶⁷ The Panel came to this conclusion using GATT Article III jurisprudence.¹⁶⁸ In previous GATT disputes, products were deemed like products when they were only distinguished by country of origin.¹⁶⁹ Finally, in completing its Article 2.1 test, the Panel concluded that the COOL measure treated Canadian and Mexican products less favorably than products from the United States because the measure modified the conditions of competition to the detriment of the imports.¹⁷⁰ The Panel found that the COOL measure effectively forced segregation of cattle and hogs by the country of origin because it demanded at every stage of the supply chain “an unbroken chain of reliable country of origin information with regard to every animal and muscle cut.”¹⁷¹ The additional segregation costs swayed producers into using only U.S. meats; consequently, Canadian and Mexican imports suffered.¹⁷²

¹⁶¹ See *id.* at 197–198; Trujillo, *supra* note 51.

¹⁶² See Shaffer, *supra* note 8, at 195–96.

¹⁶³ Panel Report, *United States–COOL*, *supra* note 58, ¶¶ 7.546–.548.

¹⁶⁴ *Id.* ¶¶ 7.235, 7.547.

¹⁶⁵ *Id.* ¶ 7.216.

¹⁶⁶ *Id.* ¶ 7.256.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* ¶ 7.254.

¹⁶⁹ *Id.*

¹⁷⁰ See *id.* ¶¶ 7.302, 7.546.

¹⁷¹ *Id.* ¶¶ 7.316–.317, 7.327.

¹⁷² See *id.* ¶¶ 7.420, 7.506.

The United States appealed the Panel's Article 2.1 ruling.¹⁷³ The Appellate Body upheld the Panel's ruling, but used a different analysis.¹⁷⁴ The Appellate Body agreed with the Panel that, through its promotion of segregation by animal origin, the COOL measure damages the competitive conditions of Canadian and Mexican products.¹⁷⁵ Further, the Appellate Body noted that even though this measure does not explicitly require segregation, and instead is a result of the decisions of private producers, the COOL measure provides an incentive for segregation.¹⁷⁶ Citing the well-known GATT case, *Korea—Measures Affecting Imports of Fresh, Chilled and Frozen Beef*, the Appellate Body stated "whenever the operation of a measure in the market creates incentives for private actors systematically to make choices in ways that benefit domestic products to the detriment of like imported products, then such a measure may be found to treat imported products less favourably."¹⁷⁷

But after agreeing with the Panel that the measure detrimentally impacted Canadian and Mexican imports, the Appellate Body faulted the Panel for conducting an incomplete Article 2.1 analysis.¹⁷⁸ Like it did in *U.S.—Clove Cigarettes* and *U.S.—Tuna II*, the Appellate Body went on to complete the analysis by determining whether "the detrimental impact stems exclusively from a legitimate regulatory distinction," or if the measure was designed to "arbitrarily or unjustifiably" discriminate against imports.¹⁷⁹

Ultimately, it decided that the detrimental impact was due to arbitrary and unjustifiable discrimination because it could not be explained by a legitimate regulatory distinction.¹⁸⁰ The United States' objective for the COOL measure was to provide consumers with information on the origin of their meat products.¹⁸¹ Most of that information, though, does not make it onto the labels consumers actually see.¹⁸² According

¹⁷³ Notification of an Appeal by the United States, *United States—Certain Country of Origin Labeling Requirements*, 1–2, WT/DS384/12, WT/DS386/11 (Mar. 28, 2012) [hereinafter U.S. COOL Appeal].

¹⁷⁴ Appellate Body Report, *United States—COOL*, *supra* note 9, ¶¶ 349–350.

¹⁷⁵ *Id.* ¶ 289.

¹⁷⁶ *Id.* ¶¶ 289–290.

¹⁷⁷ *Id.* ¶ 288; Appellate Body Report, *Korea—Measures Affecting Imports of Fresh, Chilled, and Frozen Beef*, ¶ 145, WT/DS161/AB/R, WT/DS169/AB/R (Dec. 11, 2000) [hereinafter Appellate Body Report, *Korea—Beef*].

¹⁷⁸ Appellate Body Report, *United States—COOL*, *supra* note 9, ¶ 293.

¹⁷⁹ *Id.* ¶¶ 293, 340; Appellate Body Report, *United States—Tuna II*, *supra* note 9, ¶¶ 240–243; Appellate Body Report, *United States—Clove Cigarettes*, *supra* note 9, ¶¶ 180–182.

¹⁸⁰ Appellate Body Report, *United States—COOL*, *supra* note 9, ¶¶ 347–350.

¹⁸¹ COOL U.S. First Written Submission, *supra* note 65, ¶¶ 206–225.

¹⁸² Appellate Body Report, *United States—COOL*, *supra* note 9, ¶ 349.

to the Appellate Body, since consumers do not see an amount of origin information that is “commensurate” with the amount producers must keep track of, the regulatory distinction cannot be justified by a need to convey this information to consumers.¹⁸³ The detrimental impact on Mexican and Canadian products stems from producers avoiding the segregation costs associated with keeping track of a large amount of origin information on imported livestock or meat.¹⁸⁴ Accordingly, because the Appellate Body found the regulatory distinctions to be arbitrary, and “the disproportionate burden imposed on upstream producers and processors to be unjustifiable[,]” it ruled the COOL measure treated imported livestock less favorably than domestic livestock, and thus inconsistent with Article 2.1.¹⁸⁵

The Appellate Body’s analysis here seems to mirror an analysis that would be done under the GATT Article XX *chapeau*.¹⁸⁶ The *chapeau* is the final prong to test if a measure is justified under the GATT exception provision, Article XX.¹⁸⁷ Similarly to the Appellate Body’s analysis in *U.S.–COOL*, to pass the *chapeau*, a measure cannot be “a means of arbitrary or unjustifiable discrimination . . . or a disguised restriction on international trade.”¹⁸⁸ In effect, the *chapeau* test is a type of necessity test which considers how a measure is applied, how it contributes to its objective, and if less-trade restrictive alternatives are available.¹⁸⁹

b. Article 2.2 Analysis

The Panel in *U.S.–COOL* found the United States measure violated Article 2.2 of the TBT Agreement because it did not fulfill its objective.¹⁹⁰ The Panel relied on the United States’ classification of its objective: “to provide consumers with as much clear and accurate origin information as possible about the origin of the meat products.”¹⁹¹ The

¹⁸³ *Id.* ¶¶ 347–350.

¹⁸⁴ *Id.* ¶¶ 348–349.

¹⁸⁵ *Id.* ¶¶ 347, 350.

¹⁸⁶ See Meltzer, *supra* note 58.

¹⁸⁷ McGRADY, *supra* note 98, at 165–66.

¹⁸⁸ GATT 1947, *supra* note 83, art. XX; see Appellate Body Report, *United States–COOL*, *supra* note 9, ¶¶ 347–350.

¹⁸⁹ See Appellate Body Report, *Brazil–Measures Affecting Imports of Retreaded Tyres*, ¶ 224–26, WT/DS332/AB/R, (Dec. 3, 2007) [hereinafter Appellate Body Report, *Brazil–Retreaded Tyres*]; Appellate Body Report, *United States–Import Prohibition of Certain Shrimp and Shrimp Products*, ¶ 184–186, WT/DS58/AB/R (Oct. 12, 1998) [hereinafter Appellate Body Report, *U.S.–Shrimp*]; Marceau & Trachtman, *supra* note 17, at 27–28; McGRADY, *supra* note 98, at 167.

¹⁹⁰ Panel Report, *United States–COOL*, *supra* note 58, ¶¶ 7.718–719.

¹⁹¹ *Id.* ¶¶ 7.619–620.

Panel stated that this objective could be considered legitimate under an Article 2.2 analysis.¹⁹² Although acknowledging that the COOL measure does provide consumers with more information than was available prior to being enacted, particularly with regards to Label A, the Panel took issue with how Labels B and C could confuse consumers.¹⁹³ Additionally, the Panel thought that allowing the choice to use Label B or Label C for meat of different origin that commingle on the same production day undermined the measure's objective.¹⁹⁴ Accordingly, the Panel found that the COOL measure failed to provide consumers with "as much *clear* and *accurate* origin information as possible," and ended its analysis by concluding that the measure was inconsistent with Article 2.2.¹⁹⁵

The United States appealed this ruling, based on a number of complaints.¹⁹⁶ One complaint regarded the Panel's failure to find that the measure fulfilled its objective at a level considered appropriate by the United States.¹⁹⁷ Unlike its decision on the United States' Article 2.1 appeal, this time the Appellate Body reversed the Panel.¹⁹⁸ The Appellate Body started its analysis by reiterating the three-prong Article 2.2 test established in *U.S.–Tuna II*, which determines (i) the degree to which the measure fulfills its legitimate objective, (ii) its trade restrictiveness, and (iii) the risks arising from non-fulfillment of the objective.¹⁹⁹

With regard to the first prong, the Appellate Body noted that, to determine the objective of a measure, a panel should conduct a holistic assessment looking at the "structure and operation" of the measure, and not simply rely on the implementing Member's classification, which the Panel did.²⁰⁰ Despite this guidance, however, the Appellate Body upheld the objective the Panel found for the COOL measure.²⁰¹ The Appellate Body took issue with the Panel putting the burden on the United States to prove that its objective was legitimate, and it took issue with the evidence the Panel used to find that consumers generally

¹⁹² *Id.* ¶¶ 7.650–.651.

¹⁹³ *Id.* ¶¶ 7.701–.710, 7.715, 7.718.

¹⁹⁴ *Id.* ¶¶ 7.705, 7.718.

¹⁹⁵ *Id.* ¶¶ 7.715, 7.719–.720.

¹⁹⁶ See U.S. *COOL* Appeal, *supra* note 173, at 1–2.

¹⁹⁷ *Id.* at 2.

¹⁹⁸ Appellate Body Report, *United States–COOL*, *supra* note 9, ¶ 468.

¹⁹⁹ *Id.* ¶ 378.

²⁰⁰ *Id.* ¶ 371.

²⁰¹ See *id.* ¶ 395.

prefer having origin information on their products.²⁰² Nevertheless, the Appellate Body still affirmed the Panel's finding that conveying meaningful origin information to consumers is a legitimate objective under Article 2.2.²⁰³ The Appellate Body noted the similarities of this objective to preventing deceptive practices, an objective recognized both in Article 2.2 of the TBT Agreement and GATT Article XX (d).²⁰⁴ But, in the end, what mattered most to the Appellate Body was that Canada and Mexico failed to meet their burden of proof in persuading the Panel that the United States objective could not be legitimate.²⁰⁵

Continuing its test, the Appellate Body considered whether the COOL measure fulfills its legitimate objective, and came to a different conclusion than the Panel.²⁰⁶ The Appellate Body ruled that the Panel wrongly found that the measure did not fulfill *enough* of its objective.²⁰⁷ Instead of setting a minimum contribution the measure must meet, the Appellate Body determined that the Panel should have considered the contribution the measure actually makes towards its objective.²⁰⁸ Thus, according to the Appellate Body, any contribution is sufficient.²⁰⁹ The degree of contribution is what matters when determining if the measure fulfills its legitimate objective, and is used to determine the objective's trade restrictiveness and the risks of non-fulfillment of its objective.²¹⁰

In the end, the Appellate Body found that the Panel committed a critical error by ignoring its own finding that the measure contributed to its objective by providing more origin information to consumers than was available before it was enacted.²¹¹ Consequently, the Appellate Body reversed the Panel's finding.²¹²

After faulting the Panel for ignoring its own findings and ending its analysis prematurely, the Appellate Body attempted to complete the Article 2.2 test.²¹³ Without factual findings by the Panel as to whether a reasonably available less-trade restrictive alternate was available to the

²⁰² *Id.* ¶¶ 449–452.

²⁰³ *Id.* ¶ 453.

²⁰⁴ *Id.* ¶ 445.

²⁰⁵ *Id.* ¶ 453.

²⁰⁶ *Id.* ¶¶ 466–469.

²⁰⁷ *Id.* ¶ 468.

²⁰⁸ *Id.*

²⁰⁹ *See id.*

²¹⁰ *Id.*

²¹¹ *Id.*

²¹² *Id.*

²¹³ *Id.* ¶ 470.

United States, the Appellate Body stated it was unable to complete this analysis.²¹⁴ The Appellate Body was presented with four alternative measures by Mexico and Canada, but would not definitively rule on the feasibility of these measures.²¹⁵ As a result, the Appellate Body overruled the Panel's finding that the COOL measure was inconsistent with Article 2.2.²¹⁶

III. ANALYSIS

In *U.S.—Clove Cigarettes*, *U.S.—Tuna II*, and *U.S.—COOL*, the Appellate Body showed its preference for finding violations under Article 2.1 as opposed to Article 2.2.²¹⁷ This is significant because the Appellate Body's analysis in each case will be applied to future TBT disputes and provide needed context for interpreting the TBT Agreement.²¹⁸ Moreover, the results of the disputes affect the regulating power of WTO members and thus influence how domestic regulations are designed.²¹⁹

By finding all of the disputed measures consistent with Article 2.2, the Appellate Body indicated that it would be difficult for a complainant to prove a measure violates that provision.²²⁰ The Appellate Body presumably made this claim difficult to prove because it is more comfortable finding a violation using non-discrimination, which is widely recognized as the WTO's core function, rather than necessity.²²¹ Additionally, because the TBT Agreement does not have exception provisions like GATT Article XX, if interpreted differently by the Appellate Body, Article 2.2 could greatly constrain the regulatory authority of WTO members.²²² Thus, the Appellate Body's unwillingness to find violations under the necessity provision reflects appropriate deference toward WTO members' regulatory authority.²²³

²¹⁴ *Id.* ¶ 491.

²¹⁵ *See id.* ¶¶ 480–491.

²¹⁶ Appellate Body Report, *United States—COOL*, *supra* note 9, ¶ 491.

²¹⁷ *See* Shaffer, *supra* note 8, at 198; Pauwelyn, *supra* note 8.

²¹⁸ Voon, *supra* note 34, at 829; Layton et al., *supra* note 1.

²¹⁹ *See U.S.—COOL Compliance Report*, *supra* note 5, ¶¶ 120–123; *U.S.—Tuna II Compliance Report*, *supra* note 5; *U.S.—Clove Cigarettes Compliance Report*, *supra* note 2; CHOW & SCHOENBAUM, *supra* note 3, at 466–67; Howse & Türk, *supra* note 12, at 77–78; MATSU-SHITA ET AL., *supra* note 14, at 132–33.

²²⁰ *See* Shaffer, *supra* note 8, at 198.

²²¹ *Id.*; *see* Nichols F. Diebold, *Standards of Non-Discrimination in International Law*, 60 INT'L & COMP. L.Q. 831, 852–53 (2011); Ming Du, *supra* note 5, at 288.

²²² *See* Ming Du, *supra* note 5, at 288; Shaffer, *supra* note 8, at 198.

²²³ *See* Ming Du, *supra* note 5, at 288; Shaffer, *supra* note 8, at 198; Meltzer, *supra* note 58.

The deference the Appellate Body showed under Article 2.2 in these cases to WTO Members' regulatory authority, however, is offset by an expansive interpretation of Article 2.1.²²⁴ In its search for discrimination under Article 2.1, after finding disparate impact, the Appellate Body seems to have added the *chapeau* test from GATT Article XX to determine whether the disparate impact is arbitrary and unjustifiable.²²⁵ In light of the purpose of the TBT Agreement to balance regulatory authority with trade liberalization, it makes sense that the Appellate Body used a second test, rather than finding a violation from disparate impact alone.²²⁶

The *chapeau* test is an effective test for Article 2.1 of the TBT Agreement because it evaluates whether the discrimination is justifiable.²²⁷ In effect, however, the *chapeau* test also analyzes the necessity of a measure, which is why some have questioned the Appellate Body's use of it in Article 2.1.²²⁸ Nonetheless, because it is used only after disparate impact has been found, the *chapeau* test used in Article 2.1 is a better way to test the necessity of technical regulations and to fulfill the purpose of the TBT Agreement.²²⁹ By incorporating the *chapeau* test into its Article 2.1 analysis, the Appellate Body has effectively added an exception provision to the TBT Agreement.²³⁰

A. *The Role of Discrimination*

In *U.S.—Clove Cigarettes*, discrimination was central to the dispute.²³¹ The United States' objective was to deter its youth from starting to smoke.²³² It attempted to achieve this objective by banning the flavored cigarettes that appealed to youths.²³³ Banning clove flavored cigarettes

²²⁴ See Pauwelyn, *supra* note 8.

²²⁵ See Shaffer, *supra* note 8, at 195, 198; Meltzer, *supra* note 58.

²²⁶ See Appellate Body Report, *United States—Clove Cigarettes*, *supra* note 9, ¶¶ 96, 109.

²²⁷ See Appellate Body Report, *Brazil—Retreaded Tyres*, *supra* note 189, ¶¶ 224–226; Appellate Body Report, *U.S.—Shrimp*, *supra* note 189, ¶ 184–186; Marceau & Trachtman, *supra* note 17, at 27–28; McGRADY, *supra* note 98, at 167.

²²⁸ See Marceau & Trachtman, *supra* note 17, at 27–28; McGRADY, *supra* note 98, at 167; Pauwelyn, *supra* note 8.

²²⁹ See TBT Agreement, *supra* note 10, pmb.; Appellate Body Report, *United States—COOL*, *supra* note 9, ¶¶ 347–350; Appellate Body Report, *United States—Clove Cigarettes*, *supra* note 9, ¶ 174.

²³⁰ See Appellate Body Report, *United States—COOL*, *supra* note 9, ¶¶ 349–350; Shaffer, *supra* note 8, at 195, 198; Meltzer, *supra* note 58.

²³¹ See Appellate Body Report, *United States—Clove Cigarettes*, *supra* note 9, ¶ 298; Pauwelyn, *supra* note 8.

²³² H.R. REP. NO. 111-58, pt. 1, at 37.

²³³ See *id.*

from Indonesia but not menthol flavored cigarettes from the United States without justification for the difference in treatment reeks of discrimination.²³⁴

On the other hand, in *U.S.–Tuna II* and *U.S.–COOL*, discrimination seemed less fundamental to the analysis.²³⁵ In *U.S.–Tuna II*, although Mexico argued that its tuna products were treated less favorably than tuna products from other countries or the United States, it primarily argued that with the AIDCP requirements in effect, the U.S. labeling requirements were unnecessary.²³⁶ The Appellate Body, however, disagreed.²³⁷ Consequently, even with the Appellate Body finding the labeling scheme inconsistent with Article 2.1, Mexico is not likely to benefit from the United States complying with that ruling.²³⁸

In *U.S.–COOL*, discrimination was an issue because the meats were labeled by national origin, which easily creates a situation where imported products are treated less favorably.²³⁹ But the meat was labeled by national origin to inform consumers of where their meats came from, which the Appellate Body determined is a legitimate objective.²⁴⁰ If that is a legitimate objective, it follows that some discrimination must be acceptable.²⁴¹ In fact, the Appellate Body seemed to suggest that, but still found discrimination because the burden on producers was too great given the small amount of information to be gleaned by consumers.²⁴² That discrimination is not the same type of discrimination the Panel dealt with in *U.S.–Clove Cigarettes*.²⁴³ Instead the Appellate Body seems to be implying that the COOL measure is more trade restrictive than necessary to fulfill its objective.²⁴⁴

After stating that the burden on producers was disproportionate compared to the amount of information consumers actually saw, the

²³⁴ Pauwelyn, *supra* note 8.

²³⁵ See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶¶ 349–350, 491; Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶¶ 297–299; Appellate Body Report, *United States–Clove Cigarettes*, *supra* note 9, ¶ 298; Shaffer, *supra* note 8, at 198; Pauwelyn, *supra* note 8.

²³⁶ Panel Report, *United States–Tuna II*, *supra* note 54, ¶¶ 4.55–.59; Shaffer, *supra* note 8, at 198; Pauwelyn, *supra* note 8.

²³⁷ See Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶ 407.

²³⁸ See Shaffer, *supra* note 8, at 5, 7.

²³⁹ Pauwelyn, *supra* note 8.

²⁴⁰ Appellate Body Report, *United States–COOL*, *supra* note 9, ¶ 453.

²⁴¹ Pauwelyn, *supra* note 8.

²⁴² See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶¶ 347–350.

²⁴³ See Appellate Body Report, *United States–Clove Cigarettes*, *supra* note 9, ¶ 298; Pauwelyn, *supra* note 8.

²⁴⁴ See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶¶ 347–350; Pauwelyn, *supra* note 8.

Appellate Body still found the measure consistent with Article 2.2 because the Panel failed to evaluate any proposed alternatives.²⁴⁵ In *U.S.—Tuna II*, the Appellate Body stated that considering alternative measures would frequently be important in an Article 2.2 analysis, but it did not say that it was an indispensable part of its balancing test.²⁴⁶

By circumventing the necessity issue in *U.S.—Tuna II* and *U.S.—COOL*, and instead focusing on discrimination, the Appellate Body showed its preference for finding violations under Article 2.1 as opposed to Article 2.2.²⁴⁷

B. Article 2.2: A Tough Claim to Prove

The Appellate Body decisions indicate that it will be very difficult for complaining countries to succeed with Article 2.2 claims.²⁴⁸ First, the Appellate Body stated that a measure need not satisfy a minimum level of contribution towards fulfilling its objective.²⁴⁹ In *U.S.—COOL*, for example, it was enough for the Appellate Body that the COOL measure provided more origin information to consumers than was available before the measure's enactment.²⁵⁰ It did not matter that the Panel found the labels, particularly Labels B and C, to be confusing to consumers, because the labels were found to make some small degree of contribution to the United States' regulatory objective.²⁵¹ Recognizing this degree of contribution, the Appellate Body "set a low bar" for what level of contribution to an objective is sufficient.²⁵² Thus, a member challenging a regulation under Article 2.2 will not likely succeed if a country claims that the measure is unnecessary because it does not adequately fulfill its objective.²⁵³

Instead, complainants must present an alternative, less trade-restrictive measure that contributes to the respondent's objective to at

²⁴⁵ See Appellate Body Report, *United States—COOL*, *supra* note 9, ¶ 491.

²⁴⁶ See Appellate Body Report, *United States—Tuna II*, *supra* note 9, ¶ 322; Shaffer, *supra* note 8, at 196.

²⁴⁷ See Pauwelyn, *supra* note 8.

²⁴⁸ See Appellate Body Report, *United States—COOL*, *supra* note 9, ¶¶ 347, 350, 491; Appellate Body Report, *United States—Tuna II*, *supra* note 9, ¶¶ 329–331; Shaffer, *supra* note 8, at 198; Meltzer, *supra* note 58; Pauwelyn, *supra* note 8.

²⁴⁹ See Appellate Body Report, *United States—COOL*, *supra* note 9, ¶¶ 468–469.

²⁵⁰ *Id.* ¶ 468.

²⁵¹ See *id.*

²⁵² Meltzer, *supra* note 58.

²⁵³ See Appellate Body Report, *United States—COOL*, *supra* note 9, ¶¶ 468–469; Meltzer, *supra* note 58.

least the same degree.²⁵⁴ That will likely be a difficult task for complainants and is another reason why the Appellate Body's decisions indicate that it will be tough for complainants to prove a violation under Article 2.2.²⁵⁵ For example, in *U.S.–Tuna II*, Mexico suggested using the AIDCP labeling scheme in conjunction with the more restrictive DPCIA labeling scheme as an alternative.²⁵⁶ The Panel found this alternative to be a less trade-restrictive alternative that, like the DPCIA labeling scheme, also partially fulfills the United States' objectives.²⁵⁷ But the Appellate Body disagreed.²⁵⁸

Instead of considering the measure's degree of contribution as a whole, as the Panel did, the Appellate Body narrowed its analysis to effects only within the ETP and concluded the existing measure contributes to a greater degree than Mexico's proposed alternative.²⁵⁹ The Appellate Body's narrowing of its analysis, rather than considering the measure's overall contribution to its objectives, made it more difficult for Mexico's alternative to satisfy its burden.²⁶⁰ The narrow scope of the Appellate Body's analysis does not bode well for future complainants.²⁶¹

The Appellate Body likely made Article 2.2 violations difficult to prove because it is reluctant to conclude that domestic regulations are unnecessary.²⁶² It is more willing to find violations using discrimination, like under Article 2.1, because preventing discrimination is widely recognized as the fundamental obligation of WTO members.²⁶³ On the other hand, the WTO is not in the business of telling governments how to fulfill State objectives.²⁶⁴ Additionally, if the Appellate Body liberally condemns measures for being more trade restrictive than necessary, it could be perceived as pushing its members too far towards trade liberalization.²⁶⁵ Thus, the WTO probably did not want to risk losing legitimacy and instead chose to use the safer non-discrimination principle, which is more in alignment with the WTO's expertise.²⁶⁶

²⁵⁴ Shaffer, *supra* note 8, at 196–98.

²⁵⁵ *See id.*; Meltzer, *supra* note 58.

²⁵⁶ Panel Report, *United States–Tuna II*, *supra* note 54, ¶ 7.566.

²⁵⁷ *Id.* ¶¶ 7.618–619.

²⁵⁸ Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶¶ 328, 331.

²⁵⁹ *Id.* ¶ 330.

²⁶⁰ Shaffer, *supra* note 8, at 198.

²⁶¹ *See id.*

²⁶² *See id.*

²⁶³ MAVROIDIS, *supra* note 12, at 21, 29; Shaffer, *supra* note 8, at 198.

²⁶⁴ *See* Shaffer, *supra* note 8, at 198.

²⁶⁵ *See id.*; Diebold, *supra* note 221, at 852–53.

²⁶⁶ Shaffer, *supra* note 8, at 198.

Moreover, the Appellate Body likely made Article 2.2 a difficult claim to prove because, if interpreted more expansively, this provision could be very constraining on the domestic regulatory power of WTO members.²⁶⁷ Unlike the GATT, the TBT Agreement does not have exception provisions.²⁶⁸ One of the GATT's exception provisions is Article XX, which contains its own version of a necessity test in clauses (a), (b), and (d).²⁶⁹ Because these are affirmative defenses, the necessity test is only conducted after a violation of another provision, like national treatment or MFN, is found.²⁷⁰ If a measure is non-discriminatory, its necessity will likely never be tested under the GATT.²⁷¹ Conversely, Article 2.2 is a primary analysis, so panels determine whether a measure is more trade restrictive than necessary to determine if a violation exists.²⁷² Even if a measure is non-discriminatory, its necessity can still be tested under the TBT Agreement.²⁷³ Thus, because the TBT Agreement tests necessity in a stand-alone provision, if given more force by the Appellate Body, Article 2.2 could limit domestic regulatory authority more than the GATT.²⁷⁴

Some international trade theorists suggest that the necessity test under the TBT Agreement is more deferential to defendants because the burden is on complainants to show a violation, as opposed to GATT Article XX, which places the burden on defendants to justify their measure.²⁷⁵ That idea was not universally accepted and, until the Appellate Body decided a case under Article 2.2, it was unknown how strictly this provision would be interpreted.²⁷⁶ Additionally, it is important to note that under GATT Article XX, the burden only switches to defendants if complainants first succeed in proving a violation.²⁷⁷

Nevertheless, by making Article 2.2 a difficult claim to prove, the Appellate Body appropriately showed deference to its members' regulatory authority.²⁷⁸ Ruling otherwise could have significantly inhibited WTO members from implementing technical regulations designed to

²⁶⁷ See Ming Du, *supra* note 5, at 281–82; Shaffer, *supra* note 8, at 198.

²⁶⁸ Marceau & Trachtman, *supra* note 17, at 19–20.

²⁶⁹ GATT 1947, *supra* note 83, art. XX.

²⁷⁰ Marceau & Trachtman, *supra* note 17, at 28.

²⁷¹ See Ming Du, *supra* note 5, at 281.

²⁷² See Marceau & Trachtman, *supra* note 17, at 28; Shaffer, *supra* note 8, at 198.

²⁷³ See Ming Du, *supra* note 5, at 281–82.

²⁷⁴ See *id.* at 281; Shaffer, *supra* note 8, at 198.

²⁷⁵ See Howse & Türk, *supra* note 12, at 105; McGRADY, *supra* note 98, at 206.

²⁷⁶ See Marceau & Trachtman, *supra* note 17, at 28–29; Shaffer, *supra* note 8, at 198; Layton et al., *supra* note 1.

²⁷⁷ See Marceau & Trachtman, *supra* note 17, at 28.

²⁷⁸ See Shaffer, *supra* note 8, at 198; Meltzer, *supra* note 58.

fulfill health, environmental, or consumer objectives.²⁷⁹ For example, the Appellate Body could have agreed with the Panel in *U.S.–COOL* that a technical regulation must meet a minimum level of contribution or else it is more trade restrictive than necessary.²⁸⁰ That would put an additional burden on regulating countries to ensure that their measures meet a sufficient level of contribution.²⁸¹ To make matters worse, this minimum level of contribution is not evaluated by the regulating country, but instead by a WTO Panel, *ex post facto*.²⁸²

Additionally, the Appellate Body could have infringed on its members' regulatory power by accepting the analysis format employed by the Panel when evaluating Mexico's proposed alternative in *U.S.–Tuna II*.²⁸³ By rejecting that analysis, the Appellate Body indicated that a less-trade restrictive alternative will not be accepted even when it contributes the same degree to the overall objective, if it contributes to a lesser degree in one location or to one element.²⁸⁴ If the Panel's analysis was accepted, countries would have to ensure that their regulations contributed to their objectives to a sufficient degree in every location, or a less-trade restrictive alternative that lowers the degree of contribution in a single area could triumph if it does not lower the measure's overall level of contribution.²⁸⁵

C. *Filling the Gap with Article 2.1*

The deference that the Appellate Body showed to the regulatory authority of WTO members while interpreting Article 2.2 is counter-balanced by its expansive interpretation of Article 2.1.²⁸⁶ By finding violations in *U.S.–Tuna II* and *U.S.–COOL*, the Appellate Body added a necessity test to Article 2.1.²⁸⁷ Although this interpretation restricts the

²⁷⁹ See Shaffer, *supra* note 8, at 198.

²⁸⁰ See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶ 468; Panel Report, *United States–COOL*, *supra* note 58, ¶¶ 7.718–20.

²⁸¹ See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶ 468; Panel Report, *United States–COOL*, *supra* note 58, ¶ 7.718; Shaffer, *supra* note 8, at 198; Meltzer, *supra* note 58.

²⁸² See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶¶ 466–467; Panel Report, *United States–COOL*, *supra* note 58, ¶¶ 7.718–20.

²⁸³ See Shaffer, *supra* note 8, at 196, 198.

²⁸⁴ See Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶¶ 328–331; Shaffer, *supra* note 8, at 197–98.

²⁸⁵ See Panel Report, *United States–Tuna II*, *supra* note 54, ¶¶ 7.618–621.

²⁸⁶ See Pauwelyn, *supra* note 8.

²⁸⁷ See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶¶ 340, 349–350; Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶¶ 296–299; Marceau & Trachtman, *supra* note 17, at 27–28.

regulatory authority of WTO members, it is a fitting way to give the TBT Agreement force, while avoiding the problems of an overly expansive Article 2.2.²⁸⁸

In all three cases, after finding disparate impact on the complainants' products as a result of the measure, the Appellate Body considered whether that disparate impact could be explained by a "legitimate regulatory distinction."²⁸⁹ In light of the purpose of the TBT Agreement, balancing trade liberalization with regulatory protection, that is a logical next step.²⁹⁰ Disparate impact alone should not be enough to find a violation under Article 2.1 because regulatory objectives sometimes require discrimination between products with different geographic origins.²⁹¹ For example, if a country exclusively exports an unhealthy product that another country wants to ban because of its health effects, then the resulting disparate impact is only incidental to the regulation.²⁹² The United States tried to justify its measure on those grounds in *U.S.—Clove Cigarettes*, but the Appellate Body was not persuaded and appropriately found no legitimate regulatory distinction between menthol cigarettes and clove cigarettes.²⁹³ But if the United States could prove a legitimate regulatory distinction—for example, if clove cigarettes were more addictive than menthol cigarettes—then the measure would not have violated Article 2.1.²⁹⁴

In *U.S.—Tuna II*, the Appellate Body concluded that the different "dolphin-safe" labeling requirements at issue were not proportionally calibrated to the risks of dolphin injury from different fishing methods in different oceans.²⁹⁵ The United States argued that its labeling scheme needed to be more stringent in the ETP because the risk to

²⁸⁸ See Appellate Body Report, *United States—COOL*, *supra* note 9, ¶¶ 347–350; Shaffer, *supra* note 8, at 198–99; Pauwelyn, *supra* note 8.

²⁸⁹ Appellate Body Report, *United States—Clove Cigarettes*, *supra* note 9, ¶ 225; see Appellate Body Report, *United States—COOL*, *supra* note 9, ¶ 340; Appellate Body Report, *United States—Tuna II*, *supra* note 9, ¶¶ 241–243.

²⁹⁰ See TBT Agreement, *supra* note 10, pmb.; Appellate Body Report, *United States—Clove Cigarettes*, *supra* note 9, ¶ 174.

²⁹¹ See Appellate Body Report, *United States—Clove Cigarettes*, *supra* note 9, ¶ 174.

²⁹² See *id.* ¶ 215.

²⁹³ *Id.* ¶ 225.

²⁹⁴ See *id.* The United States did not have sufficient evidence to support its concerns about healthcare costs and an expanding black market, and relied ostensibly on the sole fact that more people smoke menthol cigarettes and that the effects of a ban were unknown. See Rob Howse, *More from Rob Howse on the Clove Cigarettes Case*, INT'L ECON. L. & POL'Y BLOG (Apr. 11, 2012, 7:58 AM), <http://worldtradelaw.typepad.com/iclpblog/2012/04/more-from-rob-howse-on-the-clove-cigarettes-case.html>.

²⁹⁵ Appellate Body Report, *United States—Tuna II*, *supra* note 9, ¶¶ 296–297; Shaffer, *supra* note 8, at 196.

dolphins was higher there.²⁹⁶ Outside the ETP, however, dolphins still face significant risks from tuna fishing.²⁹⁷ Accordingly, the Appellate Body concluded that the different requirements are not designed to evenly respond to the likelihood of harm to dolphins.²⁹⁸ Since the requirements were not proportionally calibrated, they are not “even-handed,” and the disparate impact is not justified by a legitimate regulatory distinction.²⁹⁹ In this manner, the Appellate Body used proportionality to find discrimination under Article 2.1.³⁰⁰ Proportionality, however, is traditionally only relevant when determining if a measure is more trade restrictive than necessary, like in Article 2.2 or GATT Article XX.³⁰¹

In *U.S.–COOL*, the Appellate Body concluded that the need to convey origin information to consumers could not justify the regulatory distinction because consumers were not seeing an amount of origin information that was “commensurate” with the amount producers had to record.³⁰² As a result, the Appellate Body found the regulatory distinction arbitrary and “the disproportionate burden imposed on upstream producers and processors to be unjustifiable.”³⁰³ Thus, in ruling that the COOL measure was inconsistent with Article 2.1 for treating imported livestock less favorably than domestic livestock, the Appellate Body took the proportionality test further than *U.S.–Tuna II*, employing an analysis that mirrored the GATT Article XX *chapeau* test.³⁰⁴

Incorporating the *chapeau* test in an Article 2.1 analysis is an effective way to test the necessity of a discriminatory measure without excessively inhibiting the regulatory authority of WTO members.³⁰⁵ Testing necessity this way avoids the concerns of an expansive Article 2.2 because this test is only used after a measure is found to be discrimina-

²⁹⁶ See *U.S. Tuna II Appeal*, *supra* note 55, ¶ 96.

²⁹⁷ See Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶¶ 293–297.

²⁹⁸ See *id.* ¶ 297; Shaffer, *supra* note 8, at 195–96.

²⁹⁹ Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶¶ 296–297; Shaffer, *supra* note 8, at 195–96.

³⁰⁰ See Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶¶ 297–298; Shaffer, *supra* note 8, at 198.

³⁰¹ See Marceau & Trachtman, *supra* note 17, at 26–29.

³⁰² *Id.* ¶ 343.

³⁰³ *Id.* ¶¶ 347, 350.

³⁰⁴ See *id.* ¶¶ 347, 350; Meltzer, *supra* note 58.

³⁰⁵ See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶¶ 347–350; Marceau & Trachtman, *supra* note 17, at 27–28; McGRADY, *supra* note 98, at 167; Shaffer, *supra* note 8, at 198; Pauwelyn, *supra* note 8.

tory.³⁰⁶ Additionally, it makes sense that the Appellate Body would draw on the *chapeau* test, given that the TBT Agreement and GATT Article XX have similar purposes and the *chapeau* is designed to detect discrimination.³⁰⁷ But in effect, the *chapeau* test also considers the necessity of a measure by evaluating how it is applied, how it contributes to its objective, and if less-trade restrictive alternatives are available.³⁰⁸ Article 2.1 was not designed to test the necessity of a measure; it was designed to balance discrimination with legitimate regulation.³⁰⁹ Thus, the Appellate Body could have found the measure in *U.S.–COOL* consistent with Article 2.1 because the regulatory distinction is the origin of meat and wanting to convey origin information to consumers is a legitimate objective.³¹⁰ Instead, the Appellate Body conducted its more expansive Article 2.1 analysis.³¹¹ First, it found the measure caused disparate impact; and subsequently, it found the disparate impact to be arbitrary and unjustifiable because the costs to producers were disproportionate to the benefits for consumers.³¹²

The only flaw in the Appellate Body's analysis is that neither it, nor the Panel, did a complete cost-benefit analysis of less trade restrictive alternatives.³¹³ Yet, the Appellate Body suggested that a less-trade restrictive alternative would require producers to keep track of less information.³¹⁴ But without a cost-benefit analysis, it is unclear that an alternative requiring less information from producers would be effective in fulfilling the United States' objective and would be reasonably available for implementation.³¹⁵ In future disputes, panels and the Appellate Body should conduct a full cost-benefit analysis to determine whether less-trade restrictive alternatives are reasonably available to the

³⁰⁶ See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶¶ 340, 347–350; Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶¶ 282, 296–297.

³⁰⁷ See GATT 1947, *supra* note 83, art. XX; TBT Agreement, *supra* note 10, pmbli; WTO GUIDE, *supra* note 25, at 71; Marceau & Trachtman, *supra* note 17, at 19–20, 26–27.

³⁰⁸ See Appellate Body Report, *Brazil–Retreaded Tyres*, *supra* note 189, ¶¶ 156, 224–226; Appellate Body Report, *U.S.–Shrimp*, *supra* note 189, ¶ 184; Marceau & Trachtman, *supra* note 17, at 27–28; McGRADY, *supra* note 98, at 167.

³⁰⁹ See TBT Agreement, *supra* note 10, art. 2.1; Appellate Body Report, *United States–Clove Cigarettes*, *supra* note 9, ¶ 174; WTO GUIDE, *supra* note 25, at 73.

³¹⁰ See Pauwelyn, *supra* note 8.

³¹¹ See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶¶ 340–350.

³¹² *Id.* ¶¶ 289, 347.

³¹³ See *id.* ¶¶ 347–350, 480–491; Panel Report, *United States–COOL*, *supra* note 58, ¶¶ 7.718–720.

³¹⁴ See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶¶ 349–350.

³¹⁵ See *id.* ¶¶ 347–350, 480–491; Panel Report, *United States–COOL*, *supra* note 58, ¶¶ 7.718–720.

implementing country before finding a violation under Article 2.1.³¹⁶ Otherwise, Article 2.1 will stifle the regulatory power of countries by punishing them for implementing a measure designed to meet an objective without determining whether a feasible alternative exists.³¹⁷

Nonetheless, using a test like the GATT Article XX *chapeau* after finding disparate impact in an Article 2.1 analysis is an effective way to balance trade liberalization with regulatory protection because this test functions as an exception provision for the TBT Agreement.³¹⁸ Like GATT Article XX, this test is only applied after a violation, disparate impact, is found.³¹⁹ Thus, countries will still be able to implement measures, whether food labeling or environmental regulations, which discriminate for legitimate reasons, so long as the resulting disparate impact is reasonably designed to respond to the regulatory objective and is thus not arbitrary.³²⁰ Additionally, evaluating necessity under Article 2.1 avoids the concerns of an overly expansive interpretation of Article 2.2 because necessity is not tested in a primary analysis.³²¹ The Appellate Body will only evaluate whether a measure meets a sufficient level of contribution to the regulatory objective after disparate impact is found under Article 2.1.³²² Moreover, the Appellate Body's legitimacy is less likely to be questioned because it is using necessity only to prevent discrimination, the main concern of the WTO.³²³ Therefore, the Appellate Body's interpretation of the TBT Agreement should prove to be a successful way to balance the rights of its members to implement technical regulations with the prevention of protectionism.³²⁴

³¹⁶ See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶ 349–350; Appellate Body Report, *Brazil–Retreaded Tyres*, *supra* note 189, ¶ 156; Marceau & Trachtman, *supra* note 17, at 27.

³¹⁷ See Appellate Body Report, *Brazil–Retreaded Tyres*, *supra* note 189, ¶ 156.

³¹⁸ See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶¶ 347–350; Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶¶ 296–297; Shaffer, *supra* note 8, at 198; Marceau & Trachtman, *supra* note 17, at 27–28.

³¹⁹ See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶ 340; Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶¶ 280, 296–297.

³²⁰ See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶¶ 347–350.

³²¹ See Shaffer, *supra* note 8, at 198.

³²² See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶¶ 340, 347–350; Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶¶ 296–297.

³²³ See MAVROIDIS, *supra* note 12, at 21, 29; Shaffer, *supra* note 8, at 7.

³²⁴ See Appellate Body Report, *United States–COOL*, *supra* note 9, ¶¶ 347–350, 468; Appellate Body Report, *United States–Tuna II*, *supra* note 9, ¶¶ 296–297, 329–31; Meltzer, *supra* note 58.

CONCLUSION

U.S.—Clove Cigarettes, *U.S.—Tuna II*, and *U.S.—COOL* are significant cases for a number of reasons. First, because the Appellate Body found the three regulations in violation of the TBT Agreement, the United States must amend or repeal the measures, or risk likely retaliatory trade action from the complaining countries. Thus, these rulings will influence how the United States regulates cigarettes, tuna products, and meat sales. More importantly, these three cases are the first cases in which the Appellate Body considered two key provisions of the TBT Agreement. Accordingly, the Appellate Body's interpretation and analyses of Articles 2.1 and 2.2 will be used in future TBT disputes.

Although the Appellate Body found three violations, its interpretations of Articles 2.1 and 2.2 ultimately were deferential to the regulating authority of WTO members. In future disputes, complainants will have a difficult time proving a violation of Article 2.2 because of how the Appellate Body interpreted that provision. The deference to regulating countries, however, comes with a price. The Appellate Body added a version of a necessity test to Article 2.1. This reading of Article 2.1 limits the regulatory authority of WTO members, but it is a fairer way to test the necessity of a measure because it is used only after finding a measure disparately impacts the complainant. Thus, countries can still implement discriminatory technical regulations that pursue legitimate objectives, so long as the discrimination is justified. The Appellate Body's calculated decision to make Article 2.2 a difficult claim to prove while adding force to Article 2.1 should successfully protect the regulatory power of countries and prevent forms of protectionism. To succeed in challenging a technical regulation, however, members should phrase their complaints in terms of Article 2.1 discrimination rather than Article 2.2 necessity.